



STATE OF INDIANA

ERIC J. HOLCOMB, Governor

**PUBLIC ACCESS COUNSELOR
LUKE H. BRITT**

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)234-0906
Fax: (317)233-3091
Toll Free: 1-800-228-6013
Email: pac@in.gov/opac
Website: www.IN.gov/pac

OPINION OF THE PUBLIC ACCESS COUNSELOR

WILLIAM KUTSCHERA)	
KCCA,)	
Complainant)	
)	
v.)	17-FC-32
)	
MADISON COUNTY BOARD OF COMMISSIONERS)	
)	
Respondent)	

ADVISORY OPINION March 27, 2017

This advisory opinion is in response to the formal complaint alleging Madison County Board of Commissioners (“Board”) violated the Access to Public Records Act (“APRA”), Indiana Code § 5-14-1.5-1 et. seq. The Board has responded via Mr. Jeffery Graham, Esq., on February 24, 2017. The response is enclosed for review. Pursuant to Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on February 8, 2017.

BACKGROUND

The formal complaint dated February 8, 2017 alleges the Madison County Board of Commissioners violated the APRA by denial of access to requested records as well as the destruction or loss of records.

Killbuck Concerned Citizens Association (“KCCA”) since 2006 has made multiple requests to the Board for documentation regarding the representation of the law firm now known as Bingham, Greenebaum, Doll, LLP (“Firm”). The most recent request dated November 17, 2016 requests the following: “Any and all meeting minutes in which discussion and/or approval of the retention of the firm dated prior to December 31, 2006 with original signatures of parties approving.”

This search for documentation of the Firm’s retention extends back to 2006. It culminated with a May 24, 2016 response from The Board’s attorney stating, “I have closely reviewed all Commissioners



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minutes from 2006 until this date, and find no reference to the authorization of hiring [Firm].” The Complainant therefore contends the retention of the Firm was unlawful and that minutes would have to exist memorializing a final action of the Board authorization the retention.

ANALYSIS

The public policy of the APRA states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” *See Indiana Code § 5-14-3-1*. The Madison County Board of Commissioners is a public agency for the purposes of the APRA. *See Indiana Code § 5-14-3-2(n)*. Accordingly, any person has the right to inspect and copy the Board’s disclosable public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. *See Indiana Code § 5-14-3-3(a)*.

Engagement letters between public agencies and law firms are typical documents which exist when a contractual agreement for representation is executed. Nothing in the law mandates this documentation, however, it is best practice and more often than not, it is indeed created. Likewise, when a public agency hires a firm, final action in the form of a vote at a public meeting is standard practice. It stands to reason documents exist memorializing this transaction and therefore I share the Complainant’s skepticism no such record was ever created and a large firm would commence representation without an engagement letter.

It appears as if the Board’s current county counsel has searched the Board’s meeting minute archives and can find no indication of such an authorization. The Board did invite the Complainants to manually inspect the meeting minutes for themselves, which is best practice when a request is generally too broad. The Board’s argument the original requests lacked reasonable particularity is well received. Some of the requests made since 2006 are merely requests for information and not a specific document. Based on the facts provided, however, the Complainants have provided sufficient information to pinpoint the document(s) they are seeking: an authorization from the Board to hire a law Firm (an engagement letter, fee agreement, contract etc.); and/or a meeting minute from 2006 indicating final action was taken by the Board to procure the Firm’s services. These are typical documents housed by public agencies in the ordinary course of business. Therefore, I am not compelled by the reasonable particularity argument in this case.

To the extent the Complainant asks this Office to find a violation based upon the non-existence of a record, I cannot do so. There is an inference documentation *should* exist, however, the law does not allow this Office to mandate the creation of this kind of record. Similarly, there is an inference a meeting



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minute *should* reflect a vote to hire the Firm on a fee-for-services arrangement. But again, if such an action was taken to retain the firm by a single Board member or another county attorney (as the Complainants suggest), such matters of procurement are beyond the scope of this Office's jurisdiction. If authorization documentation does exist, poor record keeping and retention is not an issue unique to this situation.

One step that has not been taken to my knowledge, however, is for either party to ask the Firm for its records of engagement, invoices, or fee arrangements likely housed in its own files in-house. Copies of these documents would be public record albeit maintained by a third-party private contractor. *Knightstown Banner v. Town of Knightstown*, 838 N.E.2d 1127 (Ind. Ct. App. 2005). Based on prior experience, I am confident this particular Firm is well-versed in good record keeping principles and accounting best practices during the course of representing public entities.

RECOMMENDATIONS

To the extent that the Madison County Board of Commissioners truly does not have any documentation from the 2006 retention of the Firm in its files, it should request those records from that Firm and provide them to the Complainant within a reasonable time.

Luke H. Britt

A handwritten signature in black ink, appearing to read "L. H. Britt".

Public Access Counselor

Cc: Mr. Jeffrey Graham, Esq.